

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**MOBILE BAYKEEPER, INC.,  
Plaintiff,**

**v.**

**ALABAMA POWER COMPANY,  
Defendant.**

**Case No.: 1:22-cv-00382-KD-B**

**ORAL ARGUMENT REQUESTED**

**DEFENDANT ALABAMA POWER COMPANY'S REPLY IN SUPPORT OF  
OBJECTIONS TO REPORT AND RECOMMENDATION**

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**November 3, 2023**

Baykeeper's response includes inaccurate characterizations of Alabama Power's objections in two important respects. First, Baykeeper's response references documentation that pertains to corrective action, not closure, and uses it to mischaracterize Alabama Power's closure plans at Plant Barry. Baykeeper claims that "Alabama Power has published its definitive statement on possible barrier walls on its own regulatorily-required CCR Compliance website and stated without qualification that it will *not* install barrier walls at Plant Barry." (Doc. 95, PageID.19264 (emphasis in original).) Baykeeper also quotes a document prepared by Anchor QEA for the proposition that "vertical barrier walls are not recommended" and that installing a wall to a depth of "approximately 75 to 100 feet" would "approach[] the limit of vertical barrier wall installation feasibility." (Doc. 95, PageID.12964-65.)

The walls that Anchor QEA discussed were different in depth, purpose, and regulatory intent from the walls that Alabama Power discussed in its Objections filing. Anchor QEA, an independent consultant to Alabama Power for groundwater issues, discussed containment walls to depths of 75 to 100 feet as a potential corrective action measure to address exceedances of contaminants in groundwater below the ash under 40 C.F.R. §§ 257.96-97. Due to feasibility concerns, Anchor QEA recommended against building that feature, and Alabama Power has no plans to. By contrast, Alabama Power plans to install walls from the working surface downward to a maximum depth of approximately 8 feet as part of the closure plan to contain the coal ash under 40 C.F.R. § 257.102(d). The language Baykeeper quoted from Anchor QEA has nothing to do with the engineering controls that form part of Alabama Power's closure plan.

Second, contrary to Baykeeper's position, Alabama Power has never argued that "groundwater is not a liquid," whether in contact with ash or otherwise. (*See* Doc. 95, PageID19258.) Water saturating ash at the bottom of an ash pond is not a "*free* liquid" if it is not "free," meaning it does not "readily separate from the solid portion of a waste under ambient temperature and pressure," as EPA's regulations require. 40 C.F.R. § 257.53 (definition of "free liquid"). That would include water embedded in subsurface solid material that cannot be accessed without altering its ambient pressure through the use of a pump.

Apart from these corrections, there is nothing in Baykeeper's response on the collateral estoppel and failure to state a claim issues that is not already addressed in Alabama Power's objections and briefing on its motion to dismiss. Alabama Power will further address the issues of standing and ripeness in accordance with the Court's November 2, 2023 Order.

Respectfully submitted on this the 3rd day of November, 2023.

/s/ Ed R. Haden

One of the Attorneys for the Defendant  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of November 2023, a copy of the foregoing was filed using the Court's CM/ECF system, which will send an electronic notice to all counsel of record.

/s/ Ed R. Haden  
Of Counsel